United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

NO. 75-7468

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 75-7468

GAYLE MCQUOID HOLLEY, individually and on behalf of JAMES MCQUOID, NORMAN MCQUOID, THOMAS MCQUOID, DOUGLAS MCQUOID, MICHAEL MCQUOID, and ADELAINE MCQUOID, her minor children,

Plaintiff-Appellant,

-vs-

ABE LAVINE, AS Commissioner of the New York State Department of Social Services, and JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE LAVINE, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES

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Preliminary

This case is an attempt by an alien, illegally in the United States, to obtain public assistance for herself under the Aid to Families with Dependent Children program (AFDC). Whether this Court chooses to provide a forum for an illegal alien to do so is for this Court to decide. In general, see Munoz, "The Right of an Illegal Alien to Maintain a Civil Action" (63 California Law Review 762 [1975]).

Questions Involved

1. In this action in which jurisdiction is alleged to be conferred by 28 U.S.C. § 1343, does the complaint set forth a substantial constitutional claim?

The District Court held that it did not.

2. Insofar as jurisdiction is sought to be grounded upon 28 U.S.C. § 1331, does the complaint (a) establish the requisite jurisdictional amount to a legal certainty, and (b) state a Federal question?

The District Court held that the jurisdictional amount requirements had not been met.

3. Where the State and County Commissioners of Social Services were sued in their official capacities only, are such officers within the scope of 42 U.S.C. § 1983?

The Court below held that they were not within the scope of 42 U.S.C. § 1983.

4. Is not an action seeking to declare a State statute unconstitutional and to enjoin its operation, brought against the State and County Commissioners of Social Services in their official capacities only, a suit against the State barred by the Eleventh Amendment to the Constitution of the United States?

The District Court did not expressly decide this question.

Statement

This is an appeal (48)* from an order of the District Court (Hon. HAROLD P. BURKE, District Judge)(46) and the judgment entered thereon (47) which dismissed the action for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief may be granted.

In this action, appellant Holley (hereinafter plaintiff Holley), an alien who has been found by the United States Department of Justice, Immigration and Naturalization Service, to be an alien "illegally in the United States" (19), seeks to obtain a grant of public assistance in the category of Aid to Families with Dependent Children. Her six minor children, on behalf of whom she also sues, presently receive AFDC. Appellee Lavine (hereinafter the State Commissioner) by Decision After Fair Hearing affirmed the action of appellee Reed (hereinafter the County Commissioner) in removing plaintiff Holley from the family budget on the ground that she is an alien who is unlawfully residing in the United States and is not eligible for public assistance (New York Social Services Law, § 131-k)(21, 22).

The action was commenced in April, 1975 and the State and County Commissioners interposed motions to dismiss (24,27).

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* All references are to the "Appendix" unless otherwise indicated. Stephen Berger has succeeded Abe Lavine as Commissioner of the New York State Department of Social Services.

On July 30, 1975, District Judge BURKE ordered that the action be dismissed for lack of jurisdiction over the subject matter and for failure to state a claim on which relief may be granted (46). Judgment thereon was entered in the office of the Clerk of the United States District Court for the Western District of New York on July 31, 1975 (47).

Background

After the decision of the Supreme Court of the United States in Graham v. Richardson (403 U.S. 365 [1971]) invalidating welfare durational residence requirements as to aliens lawfully in this country, the Federal Secretary of Health, Education and Welfare issued proposed regulations to "implement" the decision.

These appeared in 37 Federal Register, p. 11977 (Friday, June 16, 1972). The proposed section 233.50 relating to citizenship and alienage in the AFDC and other programs would have read as follows:

> "§ 233.50 Citizenship and alienage.
>
> Condition for plan approval: A State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act may not exclude an otherwise eligible individual on the basis that he is not a citizen, or because of his alien status."

On June 27, 1973, the Secretary published a revised proposed section 233.50 in the form as finally promulgated (38 Federal Register, p. 16911). That publication indicates that comments were received from 59 persons, 50 of whom were opposed to granting of assistance to aliens who have not been lawfully admitted to this country; that the comments were based primarily on (1) the belief that the Supreme Court decision in Graham v. Richardson, and the equal protection clause of the Constitution are not applicable to aliens not lawfully admitted to the United States; (2) the fear that "this policy" would raise case loads beyond a State's fiscal capabilities or require a corresponding reduction of assistance to citizens and lawfully admitted aliens, and (3) the belief that assistance to such aliens, if provided at all, should be fully financed from Federal funds, since the Federal Government has responsibility for immigration and naturalization. The publication also states "[r]ecent congressional action, e.g., the exclusion of 'illegal' aliens from the Supplemental Security Income program, coincides with the public response."

On Friday, November 2, 1973, the Secretary promulgated the revised section 233.50 (38 Federal Register, p. 30259). The preamble to the regulation stated that the previous proposal published on June 16, 1972 "was interpreted as

requiring inclusion of aliens not legally in this country"

and that:

> "Requiring inclusion of illegal aliens, or leaving the matter to State option would be inconsistent with title III of Pub. L. 92-603, which establishes a Federal program of Supplemental Security Income for the Aged, Blind, and Disabled (SSI) that excludes aliens not lawfully residing in this country. Accordingly, the regulations as proposed on June 27, 1973, are hereby adopted."*

Section 233.50, as promulgated on November 2, 1973, provides as follows:

> "233.50. Citizenship and alienage.
>
> "Conditions for plan approval. A State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act shall include an otherwise eligible individual who is a resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act)."

---

* See 42 U.S.C. § 1382c(a)(1)(B) which provides:

> "(a)(1) For purposes of this subschapter, the term 'aged, blind, or disabled individual' means an individual who—
>
> * * *
>
> "(B) is a resident of the United States, and is either (i) a citizen or (ii) an alien lawfully admitted for permanent residence or otherwise permanetly [sic] residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 1153(a)(7) or section 1182(d)(5) of Title 8)."

While the November, 1973 Federal Register release carried an effective date of January 2, 1973, the Federal regulation obviously became effective January 2, 1974.

After the promulgation of the Federal regulation, New York State Departmental Regulation 18 NYCRR § 349.3, relating to "illegal aliens", was added on May 2, 1974, to be effective April 1, 1974. Social Services Law, § 131-k was added by Laws of 1974, Chapter 811 and became effective June 7, 1974 upon approval by the Governor.

The State statute and the Departmental Regulation do not define who is an illegal alien in recognition of the fact that it is not for the State of New York to do so but for the United States Immigration and Naturalization Service.

Plaintiff Holley's problem arises out of the fact that under the Federal regulation (45 C.F.R. § 233.50) she is neither "an alien lawfully admitted for permanent residence" or an alien "otherwise permanently residing in the United States under color of law" (emphasis supplied). The Immigration and Naturalization Service has stated that plaintiff Holley "is illegally in the United States" and that "this service does not contemplate enforcing her departure from the United States at this time. Should the dependency of the children change, her case would be reviewed for possible action consistent with the circumstances then existing" (Exhibit A, annexed to the Complaint, 19). Thus, plaintiff Holley is not permanently

in the United States under color of law but is in fact an illegal alien.*

For an exposition of "the illegal alien problem" in the United States, see United States v. Ortiz, ___ U.S. ___, 45 L. Ed. 2d 623 (June 30, 1975), concurring opinion of the Chief Justice at 45 L. Ed. 2d, p. 630. See also United States v. Baca, (368 F. Supp. 398 [D.C.S.D., Cal., 1973]). In the latter case, an exposition of "the illegal alien problem" appears at 368 F. Supp. 402 which was set out by the Chief Justice in his concurring opinion in Ortiz. The exposition recites in part:

> "In some states illegal aliens abuse public assistance programs. In some instances entire families who entered the country illegally have been admitted to the welfare rolls. Aliens in California at 35, 43".

See 368 F. Supp. at 403 and 45 L. Ed. 2d at 633.

There are "as many as" 12 million illegal aliens now present in the country (45 L. Ed. 2d at 630). The potential for abuse of the welfare system would appear to be real.

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* See 8 U.S.C. § 1101(a)(31), which provides:

> "§ 1101. Definitions
> (a) As used in this chapter--
> * * *
> (31) The term 'permanent' means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law."

The Complaint (9)

The complaint challenges the validity of section 131-k of the New York Social Services Law, as enacted and applied, in that it is alleged to "operate to deprive aliens residing in the United States under color of law, and their families, of their right to public assistance" under the New York State AFDC program and in that it "operates to deprive plaintiffs of rights secured by the Fourteenth Amendment to the Constitution of the United States, [42 U.S.C. § 1983 of the Social Security Act and 42 U.S.C. § 301', et seq.] and regulations promulgated thereunder"(9).

Jurisdiction is alleged to be conferred on the Court by 28 U.S.C. §§ 1343 and 1331 (10).

The complaint alleges that plaintiff Holley is a citizen of Canada who has been a resident of the United States since 1954, presently residing in Monroe County, New York, and that her six minor children, plaintiffs on behalf of whom she also sues, are aged 14, 13, 12, 11, 9 and 1, and are citizens of the United States by birth (10); that the United States Immigration and Naturalization Service has classified plaintiff Holley "as a deportable alien" but has determined "not to deport her, for humanitarian reasons, so long as her citizen children remain dependent upon her" (11); that application to the Immigration and Naturalization Service for status as an immigrant alien was denied because as a person receiving public assistance

she is ineligible for immigrant status (11); and that since 1968, plaintiff Holley has been the recipient of AFDC on behalf of her children (11). The complaint further alleges the enactment of New York Social Services Law, § 131-k, effective June 7, 1974, which provides that an alien unlawfully residing in the United States shall be ineligible for public assistance in the AFDC category (12); the implementation of such statute by Departmental Regulation 18 NYCRR § 349.3 (12); action on the part of the County Commissioner on August 20, 1974 to reduce the public assistance grant for the seven plaintiffs by the amount allocated to meet the needs of plaintiff Holley because her "alien status made her ineligible for public assistance", resulting in a loss of $50.33 per month to the "McQuoid family household" (12); the request for a departmental fair hearing and the affirmance of the County Commissioner's action by the State Commissioner (12, 13); and the marriage of plaintiff Holley on February 25, 1975 to Wayne Holley, a recipient of a "separate public assistance grant" for which eligibility is based on disability (13).

The complaint alleges four causes of action:

1. That New York Social Services Law, § 131-k, as enacted and applied, is invalid in that it is "inconsistent with, and operates to defeat the purposes of, the Social Security Act" (14, 15). Here plaintiffs rely on 42 U.S.C. §§ 601, 602(a)(10) and 606(b)(1)*.

* The reference to Social Security Act, 42 U.S.C. § 301, et seq. appears to be in error. That section relates to the Federal program of Old Age Assistance now inapplicable to the 50 States (Public Law 92-603, § 303).

2. That section 131-k, as enacted and applied, is invalid in that it is inconsistent with Federal regulatory authority (45 C.F.R. § 233.50) in that plaintiff Holley "is permanently residing in the United States under color of law" within the provisions of such regulation.

3. The third cause of action alleges plaintiffs' constitutional claim and is here set out verbatim:

> "34. Plaintiffs restate, reallege and incorporate each and every allegation in paragraphs 1-33.
>
> "35. The Fourteenth Amendment to the Constitution of the United States provides that:
>
> > No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> "36. Section 131-k of the New York State Social Services Law, as enacted and applied by the defendants, deprives the plaintiffs of their rights to equal protection and due process of law. As a result, plaintiffs are denied rights secured by the Fourteenth Amendment to the Constitution of the United States." (16, 17)

4. That plaintiffs are being denied rights secured by the Civil Rights Act of 1871 (42 U.S.C. § 1983).

The complaint requests (18):

(a) A declaration that New York Social Services Law, § 131-k, as enacted and applied, is invalid

in that it is inconsistent with Federal laws and regulations and violates rights secured to the plaintiffs by the Constitution and laws of the United States.

(b) A temporary restraining order, preliminary injunction, and permanent injunction restraining the enforcement of New York Social Services Law, § 131-k.

(c) The convening of a Three-Judge Court pursuant to 28 U.S.C. § 2281, et seq.

(d) That plaintiffs be granted damages in the amount of the "public assistance benefits" denied to them as a result of the operation of section 131-k, and

(e) That plaintiffs be allowed their costs, disbursements and attorney's fees.*

* In this brief in which we argue in support of the order and judgment below dismissing the action, we do not address ourselves to the question of damages and attorney's fees (paragraphs (d) and (e) above). We note, however, that as to damages, the Eleventh Amendment is a bar (Edelman v. Jordan, 415 U.S. 651 [1973]) and that the Supreme Court has held that attorney's fees may not be awarded. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).

The State Commissioner's Motion to Dismiss (24)

The State Commissioner's motion to dismiss sought an order of the Court:

> "To dismiss the action on the ground that the complaint fails to state a claim upon which relief can be granted for the reason that the plaintiff, Gayle McQuoid Holley, is an alien illegally present in the United States (as shown by Exhibit 'A' in her complaint herein), and that consequently she has no standing to demand, or qualification for, and no entitlement to benefits for herself under the Social Security laws of the United States."

The County Commissioner's Motion to Dismiss (27)

The County Commissioner's motion to dismiss requested an order:

> "1. That the action of the within plaintiff be dismissed on the ground that this Court lacks jurisdiction over the subject matter; and that there is no federal question subject matter jurisdiction.
>
> "2. That the action of the within plaintiff be dismissed on the ground that the Complaint fails to state a claim upon which relief can be granted.
>
> "3. That this court deny the plaintiff's application for damages, since such alleged damages would have to be paid from the public funds in the State Treasury.
>
> "4. That this court deny the plaintiff's application for attorney' fees since the payment by the State of attorneys' fees is barred by the Eleventh Amendment to the United States Constitution.
>
> "5. That this court deny the plaintiff's application for the convening of a three-judge court on the ground that the pleadings of the plaintiff fail to make out a substantial constitutional claim."

Decision and Order Below (44)

District Judge BURKE held:

> "The suit is an attack on a state statute and state regulation, not on action taken under the statute and regulation. The complaint is against the state and County of Monroe, not against the Commissioner of the New York State Department of Social Services as an individual, nor against the Commissioner of the Monroe County Department of Social Services as an individual. Neither the state commissioner nor the county commissioner are within the scope of Section 1983. Rosado v. Wyman, 414 F. 2d. 170, 178.
>
> "The complaint asserts no substantial claim of unconstitutionality. There is no showing that the amount in controversy exceeds $10,000.00, exclusive of interest and costs.
>
> "ORDERED that the action is dismissed for lack of jurisdiction over the subject matter and because the complaint fails to state a claim upon which relief may be granted." (45, 46)

Provisions of the United States Constitution Involved

Eleventh Amendment

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Fourteenth Amendment

Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes of the United States Involved

42 U.S.C. § 1983

"§ 1983. Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. § 1331

"§ 1331. Federal question; amount in controversy; costs

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

* * *"

28 U.S.C. § 1343(3)

"§ 1343. Civil rights and elective franchise

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

"(3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

* * *"

Regulation of the Federal Secretary of Health, Education and Welfare Involved

45 C.F.R. § 233.50

"§ 233.50 Citizenship and alienage.

Conditions for plan approval. A State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act shall include an otherwise eligible individual who is a resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act). [38 FR 30259, Nov. 2. 1973]"

Statute of the State of New York Involved

New York Social Services Law, § 131-k

"§ 131-k. Illegal aliens

"1. Any inconsistent provisions of this chapter or other law notwithstanding, an alien who is unlawfully residing in the United States or who fails to furnish evidence that he is lawfully residing in the United States shall not be eligible for aid to dependent children, home relief or medical assistance, except for a temporary period of thirty days in accordance with subdivision two of this section.

"2. An otherwise eligible applicant or recipient who has been determined to be ineligible for aid to dependent children, home relief or medical assistance because he is an alien unlawfully residing in the United States or because he failed to furnish evidence that he is lawfully residing in the United States shall, nevertheless, be eligible to receive home relief and medical assistance for a temporary period not to exceed thirty days from the date of such determination in

order to allow time for the referral of the cases to the United States immigration and naturalization service, or nearest the consulate of the country of the applicant or the recipient, and for such service or consulate to take appropriate action or furnish assistance." (Added L. 1974, c. 811, § 1, effective June 7, 1974.)

Regulation of the New York State Department Of Social Services Involved

18 NYCRR § 349.3

"349.3 Illegal aliens

"(a) Any inconsistent provisions of this Title notwithstanding, an alien who is unlawfully residing in the United States, or fails to furnish evidence that he is lawfully residing in the United States as required by this section and Part 351 of this Title, is not eligible for aid to dependent children, home relief or medical assistance, except for a temporary period of 30 days in accordance with subdivision (b) of this section.

"(b) An otherwise eligible applicant or recipient who has been determined to be ineligible for aid to dependent children, home relief or medical assistance because he is an alien unlawfully residing in the United States, or because he failed to furnish evidence that he is lawfully residing in the United States as required by this section and Part 351 of this Title, shall, nonetheless, be eligible to receive home relief and medical assistance for a temporary period not to exceed 30 days from the date of such determination in order to allow time for the referral of the case to the United States Immigration and Naturalization Service, or the nearest consulate of the country of the applicant or recipient, and for such service or consulate to take appropriate action or furnish assistance." (Added May 2, 1974, effective April 1, 1974.)

Summary of Argument

As a response to this appeal from the order and judgment below, which dismissed the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted, we urge first that the complaint fails to state a substantial constitutional claim in that since the third cause of action set out therein is entirely conclusory in nature, it cannot form the basis for civil rights jurisdiction. Even assuming the allegations of the complaint to be particularized sufficiently to form a basis for a determination of substantiality, we urge that plaintiff Holley as an illegal alien is not entitled to assert equal protection and substantive due process constitutional claims by reason of her unlawful presence in the United States.

We further urge that plaintiff Holley cannot obtain AFDC through the device of having her citizen children assert an alleged constitutional claim since to do so would be to permit her to indirectly accomplish that which she could not accomplish directly.

Since plainiff Holley is subject to deportation by the United States Immigration and Naturalization Service, she cannot be deemed to be permanently residing in the United States under color of law within the meaning of the Federal regulation.

We also urge that the Court does not have Federal question jurisdiction under 28 U.S.C. § 1331 by reason of the absence of the requisite jurisdictional amount of $10,000 and by reason of the absence of a Federal question. The Federal regulation was adopted by the Federal Secretary of Health, Education and Welfare specifically to exclude aliens unlawfully in the country from grants of AFDC. Such determination by the Secretary, the officer charged with the administration of the AFDC provisions of the Social Security Act, is entitled to great weight in construing the provisions of that Act.

Finally, we urge that the Court below correctly found that, since the State and County officers were not sued as individuals in this suit which attacks a State statute, the complaint is against the State and County. Thus the Court did not err when it found that the State and County Commissioners are not within the scope of 42 U.S.C. § 1983.

ARGUMENT

POINT I

THE CONCLUSORY ALLEGATIONS OF THE COMPLAINT AS TO PLAINTIFFS' CONSTITUTIONAL CLAIM (THIRD CAUSE OF ACTION) DO NOT PROVIDE AN ADEQUATE BASIS FOR THE ASSERTION OF A CIVIL RIGHTS CLAIM AND WARRANTED DISMISSAL OF THE ACTION. IN ANY EVENT PLAINTIFFS' CONSTITUTIONAL ARGUMENTS, SET FORTH ONLY IN THEIR BRIEF, ARE WHOLLY AND CLEARLY INSUBSTANTIAL. THE COURT BELOW PROPERLY DISMISSED THE ACTION.

Plaintiffs' constitutional claims are not articulated in the complaint. The complaint does not allege how plaintiffs have been deprived of any constitutional rights but rather its allegations are entirely conclusory in nature (17). Since "[t]he existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint" (Ex parte Poresky, 290 U.S. 30, 32 [1933]; Goosby v. Osser, 409 U.S. 512, 521 [1972]) and since the complaint contains no allegations by which substantiality could be determined, it is plainly insufficient to confer civil rights jurisdiction. This Court has held that "[m]ere conclusory allegations do not provide an adequate basis for the assertion of a claim for violation of [42 U.S.C. § 1983 and 28 U.S.C. § 1343(3)]." Albany Welfare Rights Org. Day Care Ctr. Inc. v. Schreck (463 F. 2d 620, 623 [2d Cir., 1972], cert. den. 410 U.S. 944 [1973]).

Plaintiffs' constitutional argument is discernible only from their brief.* What is to be tested on the State and County Commissioners' motions to dismiss is the sufficiency of the complaint, not the sufficiency of a brief in support of a complaint. We shall demonstrate, however, that, as briefed, plaintiffs' arguments are without merit.

A. As to the Constitutional Argument of Plaintiff Holley.

Plaintiff Holley, the Immigration and Naturalization Service has found, "is illegally in the United States" (19). She is deportable, a person without permanent status while in the United States. She has no right to be here at all. Yet she seeks welfare for her support and, in so doing, seeks to use Federal, State and County funds under the AFDC program to sustain her in maintaining her illegal status. Plaintiff has no such entitlement under the United States Constitution. (Compare 8 U.S.C. § 1182[a][8] that aliens who are paupers shall be excluded from admission to the United States and 8 U.S.C. § 1251(8) that certain lawfully admitted aliens who become public charges are deportable.)

It is the alien's lawful presence in this country that invests him with certain constitutional rights including those protected by the First and Fifth Amendments and by the due process clause of the Fourteenth Amendment. Bridges v. Wixon

* And the constitutional arguments made in plaintiffs' brief here are different from those as briefed below. Compare pp. 21-25 of plaintiffs' main brief below with pp. 23-29 of their brief in this Court.

(326 U.S. 135, 161 [1945], concurring opinion). See also Johnson v. Eisentrager (339 U.S. 763, 770-771 [1950]; Kwang Hai Chew v. Colding (344 U.S. 590, 597 [1952]). It is the alien's lawful presence within the United States upon which his entitlement to welfare payments as a matter of equal protection of the laws is grounded. Graham v. Richardson (403 U.S. 465 [1971]).*

The thread of lawful presence within the United States, as the cornerstone upon which the constitutional rights of aliens are grounded, consistently runs through the opinions of the Supreme Court.

Thus in Truax v. Raich (239 U.S. 33 [1915]) it was held that under the Fourteenth Amendment a State could not "* * * deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood" (239 U.S. at 41) (emphasis supplied).

In Takahashi v. Fish and Game Comm. (334 U.S. 410 [1947]) it was held that the State of California could not prohibit an alien from making a living by fishing off shore. In construing the Fourteenth Amendment and 42 U.S.C. § 1981 (then 8 U.S.C. § 41) the Court held (334 U.S. at 420):

---

* As to an alien durational residency requirement see also Diaz v. Weinberger (361 F. Supp. 1 [S.D. Fla., 1973]) probable jurisdiction noted (416 U.S. 980 [1973]) reargument ordered (420 U.S. 959 [1975]) where the District Court assumed, without deciding, that the Congress could properly deny supplemental medical insurance benefits to aliens who are illegally residing in the United States (361 F. Supp. at p. 12).

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."* (Emphasis supplied.)

And see Flemming v. Nestor (363 U.S. 603, 607 [1959]), where, in answer to a claim that discontinuance of social security benefits of a deported alien constituted punishment without judicial trial, the Supreme Court held (363 U.S. at 617) "* * * it cannot be said * * * that the disqualification of certain deportees from receipt of Social Security benefits while they are not lawfully in this country bears no rational connection to the purposes of the legislation * * *." (Emphasis supplied.)

In Noel v. Chapman (508 F. 2d 1023 [2d Cir., 1975] appeal pending) this Court recognized (p. 1026, footnote 5) that the Supreme Court in Graham v. Richardson, supra, Takahashi v. Fish and Game Comm., supra, and in other cases "[did] not go further than to declare that the federal and state governments cannot treat aliens legally residing in this country differently from citizens with regard to certain rights and privileges" (emphasis supplied).

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* 42 U.S.C. § 1981 provides that:

> "§ 1981. Equal rights under the law
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The constant and persistent qualification of the recognition of the constitutional rights of aliens by the Supreme Court by the reference to "lawful" aliens, recognized by this Court in Noel, is evidence, not only that unlawful aliens do not have the rights of lawful aliens, but is also recognition of the closely circumscribed rights of illegal aliens which have been delineated by the courts.

Those rights, insofar as we have been able to determine, relate to Fifth Amendment guarantees of procedural due process as to (1) those seeking admission to the United States, and (2) those within the United States who are subject to deportation proceedings.* In general, it would appear that those seeking admission to this country may not assert any Fifth Amendment rights. See Kaplan v. Tod (267 U.S. 228 [1925]). Such a person is "at the boundary line and * * * [gains] no foothold in the United States" (p. 230). Once an alien has, however, entered the country, albeit illegally, due process requires that he generally be given a hearing in a deportation proceeding. The Japanese Immigrant Case (189 U.S. 86, 100 [1903]); Leng May Ma v. Barber (357 U.S. 185 [1957]). Such aliens do not merely stand "on the threshold of initial entry" (357 U.S. at 187). In a sense, it seems that an illegal alien within the country is "at liberty" and that liberty may not be taken from him without procedural due process of law. Certainly such a principle is consistent with the foundations which underpin the Constitution.

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* Cf. "The Right of an Illegal Alien to Maintain a Civil Action", (63 California Law Review 762 [1975], supra).

To say that the illegal alien is not merely "on the threshold of initial entry" is to imply nothing more, as far as his personal freedoms are concerned, than that he has a foot in the door.

The illegality of his presence within the country, however, at once sets him apart from citizens or lawfully admitted aliens. His presence is a drain upon the resources of the country. We submit that he should not be permitted to come forward to seek to employ the judicial process of the courts to aid him in obtaining public welfare in the face of his illegal presence.

We urge that an illegal alien, aside from due process rights afforded him in deportation proceedings, should be regarded as stopped at the boundary line of the country and to have no greater constitutional rights than any other person so stopped. While it would appear that an illegal alien may raise the shield of procedural due process, the sword made available by the Equal Protection Clause and by substantive due process is not, at least in the welfare area, his to swing.

We urge that an illegal alien, at large in the country, can have no greater constitutional rights than an alien paroled into the country pursuant to 8 U.S.C. § 1182(d)(5). In Application of Patorovics (156 F. Supp. 813 [S.D.N.Y., 1957]), then District Judge KAUFMAN held (p. 816) "* * * that any rights a parolee may have [to an inquiry upon revocation of parole] are not derived from the Constitution but are limited solely to those

rights and privileges which Congress in its wisdom sought to confer" (emphasis supplied).

On appeal this Court reversed and held that a hearing was required, as in deportation cases, apparently only because Patorovics, a Hungarian refugee, had been invited to the United States pursuant to foreign policy as formulated by the President. Sub nom. United States v. Murff (260 F. 2d 610 [2d Cir., 1958]). Later in Wong Hing Fun v. Esperdy (335 F. 2d 656 [2d Cir., 1964], cert. den. 379 U.S. 970 [1964]), this Court confined its decision in Murff "to its special facts" (335 F. 2d at 657).

This Court's reversal of Patorovics was on very narrow grounds. We submit that the holding of the District Court concerning the lack of a parolee's constitutional rights is sound and that an illegal alien does not have any greater rights than does a parolee. Nor should he have.

While classifications directed at aliens are deemed, generally, to be suspect (Graham v. Richardson [403 U.S. at 372]), illegal aliens stand on a different footing for, by the very nature of their presence within the country, it is the illegal aliens themselves who are suspect. There is no inherent evil in dealing with illegal aliens in a manner which recognizes them exactly for what they are. The State, we submit, is not required to demonstrate either "a compelling state interest" (Graham v.

Richardson, supra)* or a "rational basis" (Dandridge v. Williams, 397 U.S. 471 [1969]) in justification of its statute excluding them from AFDC welfare payments.

See Alonso v. Dept. of Human Resources (123 Cal. Reptr. 536 [Cal. Ct. of App., July 30, 1975], pet. for hearing denied [Cal. Sup. Ct., September 24, 1975]) holding that an illegal alien is not entitled to unemployment insurance benefits.** The California Court of Appeals held, inter alia, after discussing Truax, Takahashi and Graham, supra (p. 540):

* The underlying rationale which requires a court to subject legislation to strict scrutiny on the basis of the "suspect classification" theory (as held to be required in the case of lawfully admitted aliens [Graham v. Richardson, supra]) "is that, where legislation affects discrete and insular minorities, the presumption of constitutionality fades because traditional political processes may have broken down." See Johnson v. Robison (415 U.S. 361, 375, footnote 14 [1974]). Illegal aliens are not "a discrete and insular minority." The "traditional political processes" require their exclusion from the country as a matter of national policy.

** Compare Commercial Standard Fire and Marine Co. v. Galindo (Texas, 484 S.W. 2d 635 [1972], application for writ of error refused) holding that an illegal alien, whose contract of employment did not aid him in his illegal entry had capacity to contract for his employment and to sue for Workmen's Compensation benefits which were awarded to him. The Texas Court apparently erroneously construed the Supreme Court's decision in Takahashi erroneously for it held that 42 U.S.C. § 1981 applied to illegal aliens. Takahashi, however, applied the section only to "persons lawfully in this country." See also Dezsofi v. Jacoby (178 Misc. 851 [Sup. Ct., N.Y.Co., 1942]); Martinez v. Fox Valley Bus Lines, Inc. (17 F. Supp. 576 [N.D., Ill., 1936]).

> "However, the common thread running through the above referenced cases involving employment of aliens is that they refer to 'lawfully resident' aliens. If an alien is here unlawfully, he has no rights under the Constitution of the United States to equal opportunity of employment as enjoyed by lawfully resident aliens (see Pilapil v. Immigration and Naturalization Service (10th Cir. 1970) 424 F.2d 6, 11) and has no right to work."

A New York Court in Dallas v. Lavine (79 Misc 2d 395 [Sup.Ct., Westchester Co., 1974]) has held, within a welfare context [Medicaid]:

> "This court does not believe, however, that the Supreme Court of the United States as yet has decided that transient, illegal aliens have the protection of the Fourteenth Amendment." (P. 398.)

and

> "This court does not read the Fourteenth Amendment or the cases cited thereunder as constitutionally requiring a State to furnish medical assistance to every alien temporarily or illegally found within its territory." (P. 400.)

See also Charles Gordon*, "The Alien and the Constitution," 9 California Western Law Review (Fall, 1972), page one at pp. 17 and 18, where the author, as to "welfare benefits" states:

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* General Counsel, United States Immigration and Naturalization Service; Adjunct Professor of Law, Georgetown University Law Center; Co-author of Gordon and Rosenfield, Immigration Law and Procedure.

> "A reservation must be noted, however, in regard to aliens here temporarily or illegally since such aliens may not be entitled to claim equal protection. Graham involved lawful permanent residents, and the Court was careful to limit its conclusions to such aliens. The extent to which aliens in temporary or illegal status can assert a right to welfare benefits, in the face of a statute which excludes them, is an issue of considerable current significance. Of interest in this connection is Flemming v. Nestor, which ratified the expungement of social security benefits for aliens who had been deported from the United States on certain specified grounds. Welfare programs are widely varied, and range from children's and old age benefits to unemployment compensation. There is also a wide diversity in the present circumstances of those who originally arrived temporarily or illegally. Some may have come recently and their stake in this country may be slight. Others may have lived in this country for years, and may have established close family ties here. Possibly such factual variances may affect the result, but it seems probable that nonimmigrants and illegal aliens excluded from such programs generally will not succeed in challenging their exclusion." (Footnotes omitted.)

Clearly the argument on behalf of plaintiff Holley is insubstantial and without merit.

B. As to the Constitutional Argument of Plaintiff Children.

Plaintiff children argue (Brief, p. 28) that "New York has created two classes of dependent children under its A.F.D.C. state plan: (1) those children residing with a parent who is a legal resident of the United States; and (2) those children residing with a parent who is not a legal resident of the United States." We submit that such argument is an

attempt to obtain welfare for plaintiff Holley through the back door which she has no constitutional right to obtain through the front door.

What is here involved is the implementation of Federal and State policy which excludes illegal aliens from access to the public fisc. Such action on the part of the Federal Government, which controls immigration and naturalization, cannot be said to be arbitrary so as to constitute unlawful discrimination under the Fifth Amendment. As to State action, which follows the path set down by the Federal Secretary of Health, Education and Welfare, such exclusion is entirely rational (Dandridge v. Williams, supra; Jefferson v. Hackney [406 U.S. 535 (1972)]). The arguments of plaintiff children are the same as those of plaintiff Holley and are insubstantial and without merit.

Plaintiffs' constitutional arguments are wholly and clearly insubstantial (Goosby v. Osser, supra). The Court below did not err in dismissing the action.

POINT II

THE COURT BELOW PROPERLY FOUND THAT THE JURISDICTIONAL AMOUNT REQUIREMENTS OF 28 U.S.C. § 1331 HAD NOT BEEN SATISFIED.

Since there is no substantial constitutional question in the instant case, plaintiffs must show that there exists some other basis for Federal jurisdiction before a Federal court can reach a pendent statutory claim. Rosado v. Wyman (397 U.S. 397, 403 [1970]); United Mine Workers v. Gibbs (383 U.S. 715, 725 [1966]).

The only jurisdictional ground alleged, other than 28 U.S.C. § 1343, is 28 U.S.C. § 1331(10). As to section 1331 jurisdiction, the Court below found that "[t]here is no showing that the amount in controversy exceeds $10,000.00, exclusive of interest and costs" (46). The Court below was correct in so finding.

If it appears that the claim, to a legal certainty, is really for less than the jurisdictional amount, section 1331 jurisdiction does not lie. See St. Paul Indemnity Co. v. Cab Co. (303 U.S. 283, 289 [1938]); also Weinberger v. Wiesenfeld (420 U.S. 636, 642, footnote 10 [1975]).

Plaintiffs cannot establish the jurisdictional amount to a legal certainty. Only the grant of plaintiff Holley is involved. A $10,000 claim on her behalf presupposes that she will remain on public assistance for a number of years. Assuming that the County Commissioner reduced her grant by

$91.99 as alleged (13), more than nine years of public assistance would be required for plaintiff Holley to reach the jurisdictional amount.* See Rosado v. Wyman (304 F. Supp. 1356 [E.D.N.Y., 1969]) at page 1363:

> "If we only look to the impending reductions in welfare payments that any family in the class may suffer, the monetary loss to each of the plaintiffs does not approach $10,000. Yearly welfare payments may not be multiplied by a number of years in the future to make up the $10,000 requirement because it is too speculative to assume that any particul plaintiff will remain on welfare for such a period or that the program will remain unchanged."

This Court, in reversing the order of Judge WEINSTEIN (414 F. 2d 170 [1969]), did not disturb that holding (id., p. 176). The Supreme Court, in reversing this Court (397 U.S. 397 [1969]) did not consider the question of section 1331 jurisdiction (id., p. 405, footnote 7).

The District Court and this Court in Rosado were correct in holding against jurisdiction. Jurisdiction pinioned upon future welfare payments for a deportable alien would indeed be speculative. Contingent or speculative claims do not meet jurisdictional amount requirements. See Thompson v. Thompson (226 U.S. 551 at p. 560 [1912]). Also, Weinberger v. Wiesenfeld, supra (420 U.S. at p. 642).

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* What was taken out of the household grant was $91.99. That amount, however, is attributable only to plaintiff Holley. In no event should it be employed to sustain section 1331 jurisdiction on behalf of plaintiff children whose grants were not reduced.

The result is that this Court has no pendent jurisdiction in the instant case to decide the statutory claim raised (§ 1343[3])* and does not have jurisdiction over the statutory claim itself (§ 1331).** Since plaintiff's constitutional claim, as has been demonstrated, is plainly insubstantial, the Court below was correct in dismissing the action.

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* Plaintiffs' first cause of action (14) is that New York Social Services Law, § 131-k as enacted and applied is invalid in that it is inconsistent with and operates to defeat the purposes of the Social Security Act. As to the first cause of action, however, we note that the Federal Secretary of Health, Education and Welfare by his regulation (45 C.F.R. § 233.50) has construed the AFDC provisions of the Social Security Act as excluding illegal aliens from entitlement (see p. 6, supra). The Secretary's interpretation is entitled to great weight. Great Northern Ry. v. United States (315 U.S. 262 [1942]); Red Lion Broadcasting Co. v. F.C.C. (395 U.S. 367 [1969]). Thus also plaintiffs' second cause of action (15) grounded upon a supposed conflict between New York Social Services Law, § 131-k and 45 C.F.R. § 233.50 is without merit.

** This Court held in Rosado v. Wyman (414 F. 2d 170, 176-178 [2d Cir., 1969]) that a District Court does not have jurisdiction to entertain a pendent statutory claim in the absence of a viable constitutional claim or some other jurisdictional basis. The Supreme Court in reversing (397 U.S. 397) did not disturb that holding. See Connecticut Union of Welfare Employees v. White (55 F.R.D. 481 [D.C.Conn., 1972] at p. 486). We note that in Hagans v. Lavine (415 U.S. 528 [1973]), the Court left "for another day" an argument that the "secured by the Constitution" language of section 1343(3) should be construed to include Supremacy Clause cases (pp. 533-534, footnote 5). In Edelman v. Jordan (415 U.S. 651 [1973]), decided the same day as Hagans, the Supreme Court held that the District Court was correct in exercising pendent jurisdiction over the statutory claim because, under the Court's decision in Hagans v. Lavine, "the equal protection claim cannot be said to be 'wholly insubstantial'". The Court thus applied traditional tests to determine jurisdiction over a pendent statutory claim (p. 653, footnote 5).

POINT III

SINCE THIS LAWSUIT INVOLVES AN ATTACK UPON A STATE STATUTE AND A STATE REGULATION, AND SINCE THE STATE AND COUNTY COMMISSIONERS WERE SUED ONLY IN THEIR OFFICIAL CAPACITIES, THE COURT BELOW CORRECTLY HELD THAT THE SUIT WAS AGAINST THE STATE AND THE COUNTY OF MONROE. THE PUBLIC OFFICERS SO SUED ARE NOT 42 U.S.C. § 1983 "PERSONS". THE ACTION, FURTHERMORE, IS ONE AGAINST THE STATE, BARRED BY THE ELEVENTH AMENDMENT.

The Court below held that "The suit is an attack on a state statute and state regulation, not on action taken under the statute and regulation. The complaint is against the state and County of Monroe, not against the Commissioner of the New York State Department of Social Services as an individual, nor against the Commissioner of the Monroe County Department of Social Services as an individual. Neither the state commissioner nor the county commissioner are within the scope of Section 1983. Rosado v. Wyman, 414 F.2d. 170, 178" (45, 46)(emphasis supplied).

This Court in Rosado v. Wyman, supra, in which the State Commissioner had been sued "individually and in his capacity as Commissioner * * *", held that "[s]ince the suit here constitutes an attack on a state statute, and not on action taken under it, the plaintiffs' complaint is against the state and not against the Commissioner as an individual. He too is therefore not within the scope of Section 1983" (414 F. 2d at 178).

The reversal by the Supreme Court of this Court's decision in Rosado v. Wyman (397 U.S. 397 [1970]) did not treat with this Court's holding. In McMillan v. Board of Education of the State of New York (430 F. 2d 1145 [2d Cir., 1970]), this Court allowed a Civil Rights action against the Acting State Education Commissioner, sued only as such, apparently only because the Supreme Court did not deal with this Court's holding in Rosado when it decided that case. We urge that this Court was correct in its decision in Rosado and that Judge BURKE was correct in deciding as he did.

True it is that "* * * the Eleventh Amendment does not prevent a federal court from directing a state official to bring his conduct into conformity with federal law" (Rothstein v. Wyman [467 F. 2d 226, 236 (2d Cir., 1972)], cert. den. 411 U.S. 921 [1973]). Also, Ex parte Young (209 U.S. 123 [1908]). The holding of Ex parte Young, however, that an officer who proceeds under an act which is in violation of the Federal Constitution is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct" (209 U.S. at 159-160) has been called "indulgence in fiction" (3 Davis, "Administrative Law Treatise", § 27.03, p. 553). Thus, attorneys have been cautioned that "Actions should * * * be brought against welfare administrators individually and in their official capacities in order to avoid the eleventh amendment restrictions on federal juris-

diction over suits against a state" ("Federal Jurisdiction Over Challenges to State Welfare Programs" [72 Columbia Law Review, 1404 at 1407, footnote 32 [1972], citing Ex parte Young, supra).

But compare Truax v. Raich (239 U.S. 33 [1915]). See Calo v. Paine, Chairman, etc., individually and in his capacity, et al. (385 F. Supp. 1198 [D.C.Conn., 1974]) where the Court held that "[t]he plaintiff is properly suing individual members of the Parking Authority, members of the Civil Service Commission and the mayor in their individual and official capacities. Thus no issue is presented as to whether a governmental entity is a 'person' * * *" (id., p. 1202). This Court reversed the dismissal of the complaint finding the existence of a triable issue but approved the section 1983 holding below (N.Y.L.J., September 5, 1975, p. 1, column 6 [2d Cir., August 18, 1975]).

We urge that where a State officer is sued only in his official capacity and not in his individual capacity as well, he is not a section 1983 "person" but is no more than the State's alter ego and that a suit against him is a suit against the State barred not only by the provisions of section 1983, but by the Eleventh Amendment as well. Cf. Forman v. Community Services, Inc. (500 F. 2d 1246 [2d Cir., 1974] reversed on other grounds ___U.S.___, 44 L. Ed. 2d 621 [1975]).*

* The Supreme Court did not reach the section 1983 issues (44 L. Ed. 2d at 629).

CONCLUSION

THE ORDER AND JUDGMENT APPEALED FROM SHOULD BE AFFIRMED.

Dated: October 31, 1975.

Respectfully submitted,

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Gayle McQuoid Holley, et al.,
Plaintiff-Appellant,

-against-

Abe Lavine, et al.,
Defendants-Appellees.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

Beverly J. Smith, being duly sworn, says:
I am over eighteen years of age and a typist
in the office of the Attorney General of the State of New York, attorney
for the appellee herein.

On the 31st day of October 1975 I served
the annexed brief for Appellee Lavine upon the
attorneys named below, by depositing two copies thereof,
properly enclosed in a sealed, postpaid wrapper, in the letter box
of the Capitol Station post office in the City of Albany, New York,
a depository under the exclusive care and custody of the United States
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Sworn to before me this
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